

**Office of Chief Counsel
Internal Revenue Service**

memorandum

CC:LM:HMT:NEW:2:POSTF-132428-02
LJSpiegel

date: August 13, 2002

to: [REDACTED] (Team Manager)

from: Associate Area Counsel
(Heavy Manufacturing and Transportation:Edison)

subject: Request for Advice

[REDACTED]
Request for Form 872 Language
Tax Period: [REDACTED]
UIL - 1502.77-00

This memorandum responds to your request for assistance dated May 13, 2002. This memorandum should not be cited as precedent.

You are examining the [REDACTED], Inc. (now [REDACTED]) and Consolidated Subsidiaries' income tax returns for [REDACTED] and [REDACTED]. In connection with that examination, you are also examining (through a [REDACTED] in [REDACTED]) the Form 1065 of [REDACTED] Ltd. for [REDACTED], [REDACTED], and possibly [REDACTED] (the first year of the partnership was [REDACTED]). You intend to propose an adjustment to the [REDACTED] Ltd. Form 1065 for [REDACTED] and have asked our assistance in drafting the consent to extend the statute of limitations (Form 872-I) with respect to the adjustments to one of the partners, [REDACTED], Inc. Specifically, [REDACTED], Inc. reported its income for [REDACTED] as a member of the [REDACTED] Company and Subsidiaries consolidated group. In light of various restructurings involving [REDACTED], Inc., and the [REDACTED] Company and Subsidiaries consolidated group since [REDACTED], as described below, you have asked us what corporate entity is the proper party to sign the Consent to Extend the Time to Assess Tax and, further, who can execute the consent on behalf of that entity.

Conclusion

Based on the facts set forth below, [REDACTED], Inc. (EIN: [REDACTED]) is the proper party to sign the consent for the tax year [REDACTED] with respect to adjustments to the [REDACTED] Company and Subsidiaries' consolidated tax liability and its liability for [REDACTED] arising from adjustments to the [REDACTED] Ltd. partnership

return for that year. The consent should read as follows:

██████████, Inc. (EIN: ██████████), as
successor to ██████████, Inc. (EIN: ██████████
██████████), formerly known as ██████████
Company, and as agent for the ██████████
Company (EIN: ██████████) and Subsidiaries
consolidated group*, or alternatively, with
respect to ██████████, Inc.'s several
liability**, or alternatively, with respect
to ██████████, Inc.'s separate return
liability***

We recommend that on the front of the consent, the asterisks
refer to the following:

*This is with respect to the consolidated tax
of the ██████████ Company (EIN: ██████████)
and Subsidiaries consolidated group.

**This is with respect to the consolidated
tax of the ██████████ Company (EIN: ██████████
██████████) and Subsidiaries consolidated group,
in the event that there is no agent for the
consolidated group.

***This is in the event ██████████, Inc. was
not a member of the ██████████ Company
(EIN: ██████████) and Subsidiaries
consolidated group for the ██████████ year.

In addition, the signature block on page 2 of the
consent should read ██████████, Inc. and be signed by a current
officer of ██████████, Inc, as follows:

[Name of officer]
[Title of Officer]
██████████, Inc.

Facts

You are currently examining the partnership return (Form
1065) of ██████████ Ltd. for ██████████ in connection with your examination
of ██████████. ██████████ Ltd. is located in ██████████.
It had two partners in ██████████. ██████████, Inc. (EIN:
██████████), a Pennsylvania corporation located at the same
address as ██████████ Ltd., was the general partner with a ██████████

partnership interest. [REDACTED], Inc. (EIN: [REDACTED]), the other partner, was a limited partner with a [REDACTED] partnership interest. Both [REDACTED] Inc. and [REDACTED] were "C" corporations in [REDACTED].

[REDACTED] Ltd. filed its [REDACTED] Form 1065 on a calendar year basis. It was signed by [REDACTED], on behalf of [REDACTED] Inc., and was filed on [REDACTED]. The Schedule B attached to [REDACTED] Ltd.'s Form 1065 reflects a check in the "No" box on line 4. to the question "Is this partnership subject to the consolidated audit procedures of section 6221 through 6233? If "Yes", see Designation of Tax Matters Partner below". However, in the space for Name and Address of Designated TMP, the return reflects "[REDACTED] Incorporated, [REDACTED], [REDACTED]." In [REDACTED]'s response to an Information Document Request (IDR) issued to it on [REDACTED], [REDACTED] represented that an affirmative election was not filed to treat [REDACTED] Ltd. as a TEFRA partnership, and your oral communication with representatives of [REDACTED] partnership confirmed that no such election was made.

You are proposing a fuel credit adjustment (an I.R.C. § 29 credit) to the [REDACTED] Ltd. Form 1065 for [REDACTED]. The proposed adjustments to [REDACTED] and [REDACTED], Inc. are \$[REDACTED] and \$[REDACTED], respectively.

You have secured an executed Form 872-I for [REDACTED] from [REDACTED] (formerly [REDACTED]). You also intend to secure a Form 872-I for [REDACTED], Inc.'s [REDACTED] taxable year.

[REDACTED], Inc. reported its income for [REDACTED] as a member of the [REDACTED] Company (EIN: [REDACTED]) and Subsidiaries consolidated group. The [REDACTED] Co. and Subsidiaries consolidated return is not under examination for [REDACTED], and you do not have the filed return. You did secure from [REDACTED], the taxpayer's accountant, however, an unsigned copy of the front page of the return and the affiliation schedule (Form 851) for that year, and unsigned copies of similar portions of the consolidated group's returns for [REDACTED] and [REDACTED]. As discussed below, the [REDACTED] and [REDACTED] copies reflect that they were filed under the name "[REDACTED], Inc. and Subsidiaries" using [REDACTED], Inc.'s employer identification number (EIN: [REDACTED]). [REDACTED] advised that the [REDACTED] return has not yet been filed.

You also secured a brief written explanation from [REDACTED] of changes to the corporate structure involving [REDACTED] Co., [REDACTED], Inc., and [REDACTED], Inc., since [REDACTED], and other information from IRS transcripts and the records of the [REDACTED] Secretary of State, as set forth below.

As noted above, [REDACTED], Inc. reported its [REDACTED] income as a member of the [REDACTED] Co. and subsidiaries consolidated group. Per the copy of the [REDACTED] Form 851, the group included at least [REDACTED] subsidiary members, including [REDACTED], Inc. and [REDACTED], Inc. The excerpt of the [REDACTED] return shows [REDACTED], Inc. (EIN: [REDACTED]) filing as parent of the former [REDACTED] Co. consolidated group, which in [REDACTED] is comprised of [REDACTED] subsidiaries. This is consistent with IRS transcripts, which reflect that the last return filed by [REDACTED] Company (EIN: [REDACTED]) was for the [REDACTED] year. The excerpt of the [REDACTED] return shows [REDACTED], Inc. as the parent of [REDACTED] subsidiaries, both of which were members of the group in [REDACTED]. Although you know that [REDACTED], Inc. is currently in existence, you do not know whether it is currently the parent of the consolidated group. However, [REDACTED] has advised that "essentially nothing has changed" since the [REDACTED] year.

For [REDACTED], [REDACTED] Company owned [REDACTED]% of the outstanding stock of [REDACTED], Inc. Per [REDACTED], [REDACTED], Inc. owned [REDACTED]% of the outstanding stock of [REDACTED], Inc. The remaining [REDACTED]% of [REDACTED], Inc., was held by [REDACTED], Inc. retirees. You have not independently verified that [REDACTED], Inc. owned [REDACTED]% of the voting power and value of [REDACTED], Inc. (i.e., met the 80/80 test of Treas. Reg. 1.1504.¹

In [REDACTED], [REDACTED] Company and its subsidiaries went through a series of restructurings. On [REDACTED], [REDACTED], Inc. redeemed the [REDACTED]% interest that was held by the retirees. On [REDACTED], [REDACTED], Inc. was merged into [REDACTED] Company and [REDACTED] Company changed its name to [REDACTED], Inc. On [REDACTED], [REDACTED], Inc. was merged into [REDACTED], Inc.

IRS records reflect that the [REDACTED] Co. consolidated group return for [REDACTED] reported a consolidated negative taxable income. [REDACTED], Inc.'s [REDACTED] and [REDACTED] also reflect negative taxable incomes.

You have advised that the statute of limitations for the [REDACTED] Company and Subsidiaries consolidated return for [REDACTED] expires on [REDACTED]. This date is based on IRS

¹Per the Affiliation Schedule (Form 851) attached to the unsigned retained copy of the [REDACTED] return, [REDACTED] Company owned [REDACTED]% of the voting power and value of both [REDACTED], Inc. and [REDACTED], Inc. However, in response to your inquiry, [REDACTED] stated that the reported [REDACTED]% ownership of [REDACTED] Inc. is erroneous.

transcripts.

Discussion

Based on the facts provided, [REDACTED], Inc. is the proper party to execute a consent to extend the statute of limitations for the [REDACTED] Company and Subsidiaries consolidated income tax return for the [REDACTED] taxable year. [REDACTED], Inc. should execute the consent as a successor to [REDACTED], Inc., formerly [REDACTED] Company, and also as the agent for the [REDACTED] Company & Subsidiaries consolidated group. In addition, we recommend, as a protective measure, for the reasons set forth below, that it also execute the consent in the alternative for its several liability for the consolidated tax of the [REDACTED] Company and Subsidiaries group for [REDACTED] and, as a second alternative, for its separate liability for [REDACTED].

First, regarding successor liability, you have advised that [REDACTED], Inc. merged into [REDACTED] Company, [REDACTED] Company then changed its name to [REDACTED], Inc., and shortly thereafter, [REDACTED], Inc. merged into [REDACTED], Inc. Based on these facts, [REDACTED], Inc. appears to be the successor by merger to [REDACTED], Inc. (formerly [REDACTED] Company). [REDACTED], Inc. was incorporated in [REDACTED]. Under the [REDACTED] successor liability statute, a corporation that survives a merger is liable for the debts and obligations of the merged companies. [REDACTED] Accordingly, we have included recommended language extending the statute of limitations for [REDACTED], Inc. on the basis of its liability as successor to [REDACTED], Inc., formerly [REDACTED] Company, for the consolidated tax of the [REDACTED] Company and Subsidiaries group for [REDACTED].

Second, [REDACTED], Inc. should also sign as the agent for the [REDACTED] Company and Subsidiaries consolidated group for [REDACTED]. By doing so, [REDACTED], Inc. will extend the statute of limitations for the several liabilities of all members of the consolidated group that were included on the [REDACTED] return.²

Pursuant to Treas. Reg. § 1.1502-77, the common parent is the sole agent for the group (i.e., the agent for each and every member of the group) for all matters relating to the income tax liability for the consolidated return year. For the most part,

²Obviously, we prefer to secure consents for as many entities as possible to have the insure the largest potential sources for collection, should a deficiency ultimately be determined.

no subsidiary has authority to act for itself. Accordingly, if [REDACTED] Company, the common parent in [REDACTED], did not cease to be the common parent, it would have been the sole agent to execute the waiver in this case. However, based on the facts presented, it is no longer in existence, having merged into [REDACTED], Inc. in [REDACTED] and thus cannot execute the consent in this case.

Treas. Reg. § 1.1502-77T, however, provides "alternative agents" to act for the group in certain prescribed situations and for certain prescribed acts, where the common parent ceases to be the common parent. Pursuant to § 1.1502-77T(a)(3), a waiver of the statute of limitations with respect to the group given by any one or more corporations referred to in § 1.1502-77T(a)(4) is deemed to be given by an agent of the group and is binding for each subsidiary in the group. Section 1.1502-77T(a)(4)(i) through (iv) describe four situations in which a corporation can qualify as an alternative agent. Based on the facts provided, we believe that [REDACTED], Inc. would qualify as an "alternative agent" under § 1.1502-77T(a)(4)(ii) and/or 1.1502-77T(a)(4)(iv).

First, it appears that [REDACTED], Inc. would be an alternative agent under § 1.1502-77T(a)(4)(ii). That subsection provides that an "alternative agent" includes a corporation which is "a successor to the former common parent in a transaction to which section 381(a) applies". [REDACTED], Inc. appears to be a successor to the former common parent [REDACTED] Company because [REDACTED], Inc. merged into [REDACTED] Company, [REDACTED] Company, then renamed itself [REDACTED], Inc., and shortly thereafter the newly named [REDACTED], Inc. merged into [REDACTED], Inc. Furthermore, we are assuming that the merger of [REDACTED], Inc. into [REDACTED], Inc. was a transaction to which section 381(a) applied, i.e., a reorganization under section 368(a)(1)(A), (C), (D), (F) or (G). However, since this is only an assumption, we strongly urge you to confirm the fact with [REDACTED], Inc. If the transaction was not a reorganization described in section 381(a), [REDACTED], Inc. will not qualify as an alternative agent under § 1.1502-77T(a)(4)(ii) to extend the statute of limitations on behalf of the consolidated group.

We also believe that [REDACTED], Inc. qualifies as an alternative agent under Treas. Reg. 1.1502-77T(a)(4)(iv). Under that provision, if the group remains in existence under § 1.1502-75(d)(2), the common parent at the time the waiver is given is also included as an "alternative agent". Pursuant to § 1.1502-75(d)(2)(ii), a group is considered remaining in existence notwithstanding that the common parent is no longer in existence if the members of the affiliated group succeed to and become the

owners of substantially all of the assets of such former parent, and there remains one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation and which was a member of the group prior to the date such former parent ceases to exist. Based on [REDACTED]'s description of the restructuring, we assume that [REDACTED], Inc. succeeded to and became the owner of substantially all of the assets of [REDACTED] Company and that it is currently still the common parent of the group. Again, however, in order to rely on this provision, you must confirm these facts with [REDACTED], Inc.--that is, that it succeeded to and became the owner of substantially all of the assets of [REDACTED] Company, and also that it is currently the common parent of the group.

We also recommend as a protective measure that you secure [REDACTED], Inc.'s agreement, in the alternative, to an extension of the statute of limitations for its several liability for the consolidated tax of [REDACTED] Company and Subsidiaries for [REDACTED], and also, in the alternative, for its separate liability for [REDACTED]. We make this recommendation because you have advised that you may not be able to confirm the required underlying information for our primary positions, outlined above, with [REDACTED], Inc. because the [REDACTED] Company & Subsidiaries return is not currently under examination, the taxpayer is not a [REDACTED] taxpayer and thus in your jurisdiction, and the expiration of the statute of limitations is imminent.

First, regarding the alternative extending the statute of limitations with respect to its several liability for the consolidated tax for [REDACTED], this provision would be effective in the event it were later established that there was no common parent for the group and [REDACTED], Inc. did not constitute an "alternative agent" under Treas. Reg. § 1.1502-77T, and would allow the Service to assess and collect any determined deficiency on the consolidated return from [REDACTED], Inc. See Treas. Reg. 1.1502-77(d).

Finally, regarding the alternative extending the statute of limitations with respect to its separate liability, this provision would be effective in the event that it was determined that [REDACTED], Inc. was not properly a member of the consolidated group for [REDACTED] and that its execution as alternative agent for the group under Treas. Reg. § 1.1502-77T did not properly extend the statute of limitations for its joint and several liability for the consolidated tax of the group.

In order to file as part of a consolidated group for a taxable year, [REDACTED], Inc. had to be a member of the affiliated

group. To be a member of the group, [REDACTED], Inc. had to meet the 80/80 test set forth in Treas. Reg. §§ 1.1501 and 1504(a) (an includible corporation owned at least 80% of the total voting power of [REDACTED], Inc. stock, and at least 80% of the total value of its stock). If it did not so qualify, technically, [REDACTED], Inc. would have to determine its [REDACTED] liability on a separate return basis. Treas. Reg. § 1.1502-77(c)(2).

In general, however, even if [REDACTED], Inc.'s income was not properly includible in the consolidated return, Treas. Reg. § 1.1502-77(c)(2) specifically provides that the common parent is the agent for extending the statute for any corporation that is included in the consolidated return but whose income is subsequently determined to have been erroneously included in a consolidated tax return (i.e., where a separate return liability is being asserted). See Alumax, Inc. v. Commissioner, 109 T.C. 133 (1997). Pursuant to Treas. Reg. § 1.1502-77T(3), the alternative agent would appear to have the same authority.

You have advised (based on information provided by [REDACTED]) that [REDACTED] Company owned, through [REDACTED], Inc., [REDACTED]% of the voting power and value of [REDACTED], Inc. and [REDACTED] owned [REDACTED]% as of the end of [REDACTED]. Under these facts, [REDACTED], Inc. met the 80/80 test of I.R.C. § 1504 for [REDACTED], and was properly included on the consolidated group's return for that year. However, you have not independently verified those facts.

We do not anticipate that [REDACTED], Inc. will assert that it was not properly a member of the consolidated group, and if it did, we would maintain that as alternative agent, it had still had authority to extend the statute for the group, including itself. However, as an additional safeguard, we have added language for inclusion in the Form 872-I by which [REDACTED], Inc. agrees to extend the statute for its separate liability in the eventuality that it was not properly a member of the group and its agreement to extend the statute as agent for the group is determined to be invalid.

As to who should sign the Form 872-I, the consent should be executed by a current, authorized officer of that corporation. IRC § 6501(c)(4) provides that the Service and a taxpayer may consent in writing to an extension of the time for making an assessment if the consent is executed before the expiration of the normal period of assessment or the extension date agreed upon in a prior extension agreement between the parties.

Section 6061 provides that any return, statement or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations.

The regulations under section 6501(c)(4) do not specify who may sign consents. Accordingly, the Service will apply the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Rev. Rul 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul 84-165, 1984-2 C.B. 305.

In the case of corporate returns, section 6062 provides that a corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. The fact that an individual's name is signed on the return is prima facie evidence that the individual is authorized to sign the return. Section 6064. Accordingly, any such officer of [REDACTED], Inc. may sign the consent.

Although not part of your formal request, we noted your conclusion that the examination of [REDACTED] Ltd. was not subject to the TEFRA procedures. While we agree that the TEFRA procedures are not applicable to the [REDACTED], Ltd. examination for [REDACTED] under the facts provided to us, in light of the fact that the partnership did enter [REDACTED], Inc.'s name and address in the space provided for the Name and Address of Designated TMP, we concur with your decision to secure a Form 872-I from [REDACTED] for [REDACTED] and your intent to secure a Form 872-I from [REDACTED], Inc. for that year (which apparently, [REDACTED], Inc. has already agreed to execute), in order to preclude any argument that the taxpayers may later raise that the TEFRA procedures were applicable to the partnership examination. We further urge you not to deviate from that procedure for any future consents you may secure relating to [REDACTED], Ltd.'s [REDACTED] Form 1065.

Please note that this advice has been sent to the National Office for post review. We will contact you within two weeks of the date of this memo to discuss any comments the National Office may have regarding this advice.

If you have any questions, feel free to contact Leslie Spiegel at [REDACTED].

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

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By: _____
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